Reconstructing The Presidency

In this chapter, we explain the need to reform the post-Trump presidency, anticipate objections and concerns, and outline the principles that should guide reform.

THE NEED FOR REFORM

Trump is not the first president to spark questions about the legitimacy of presidential power. But his characteristic excesses have not been those of his predecessors. The George W. Bush administration often invoked Article II powers to disregard congressional statutes in important contexts. Trump has not done so to the same degree. The Obama administration engaged in presidential action that often rested on aggressive interpretations of congressional statutory delegations. Trump has done some of that, especially during the conflict with Congress over pandemic relief, but not as much. Despite his targeted killing of Iranian Gen. Qassem Soleimani, Trump has not been as aggressive as his two predecessors in expanding available unilateral presidential war powers. Nor did Trump follow through on his campaign pronouncements that indicated a readiness to break the law by, for example, reinstating waterboarding, censoring the internet, using the military for indiscriminate attacks on civilians, throwing his opponents in jail, and the like.

Trump did proudly claim a "right to do whatever I want as president,"[1] and he has shown little patience for the idea that law meaningfully constrains his freedom of action. But the argument for reform of the presidency does not rest primarily on Trump's defiance of the law. Trump's law-breaking bark—though undoubtedly corrosive, as we explain below—has often been worse than his bite. And many of his efforts to break the law have been checked by courts and executive branch officials. The case for reform rests less on Trump's law-breaking tendencies and more on how his conception of the office of the presidency and his actions in it have exposed gaps and ambiguities in the law and norms governing the office, and broader weaknesses in presidential accountability. These concerns flow from four related elements of Trump's conduct of the presidency.

First, as has been noted widely, Trump is indifferent to the nonlegal norms of presidential behavior that have been established since Watergate to constrain presidential power and ensure presidential accountability. The examples are too legion to list but include his refusal to release his tax returns; his frequent public comment on and threats to intervene in law enforcement actions; his abandonment of routine White House press briefings and presidential press conferences; and his vicious personal attacks on judges, governors, executive branch officials, and even private citizens.

Second, Trump has merged the institution of the presidency with his personal interests and has used the former to serve the latter like no previous occupant of the office.[2] To give just a few examples, many of which are norms violations as well: He repeatedly sought to intervene in the special counsel's investigation of himself and his associates, and declined to cooperate with the special counsel where his own conduct was at issue. He has often publicly urged the Justice Department to investigate and prosecute his political opponents. He has used the presidency to make money off his businesses. He has used his control over diplomacy to seek the assistance of foreign powers to win an election. He has used the bully pulpit at the height of the coronavirus public health crisis to glorify his television ratings and attack his political opponents. He has tried to direct law enforcement to protect friends, family, and himself, and he has threatened to use the pardon power to do the same.

Third, Trump has aggressively and often mendaciously attacked core institutions of American democracy—especially the press, the judiciary, Congress, state and local governments, and many elements of his own executive branch, including the Justice Department and the intelligence agencies. Trump's institution-bashing usually goes hand in hand with his brand of populist anti-elitism and his resistance to limits on the assertion of his personal will. "The populist tends to believe that institutions are inherently corrupt because they are so easily captured by 'elites,'" notes Eric Posner.[3] Trump routinely makes these claims, and he clearly sees in institutions and institutional process impediments to the achievement of his purposes. Trump's attacks on institutions differ dramatically from the truth-shading and institution-criticizing that occurs in ordinary politics. Trump frequently tells big, verifiable lies in the course of condemning these institutions and persons in harsh, vicious, and demeaning ways. And he does so with the apparent intent and clear effect of weakening public confidence in these institutions. These institutions and related norms have often held up well to Trump's onslaught. But Trump has done a lot of damage, and he has paved the way for worse.

Fourth, Trump deploys authoritarian rhetoric and threatens authoritarian action, often before large crowds, even if he typically does not follow through. He has implied that he is not bound by law, or that he wants to break free of it, even though in the end he usually stops just shy of what would, by general agreement, be clear violations of the law. He threatens to crack down on the press with lawsuits but does not actually do so. He incites citizens to law-defiant behavior—for example, in his tweets urging citizens to disregard stay-at-home orders in some of the states during the coronavirus pandemic. He is harshly critical of leaders of democratic allies and allied institutions like NATO, and he expresses admiration for foreign authoritarian leaders like Vladimir Putin, though his administration has maintained traditional NATO policies and relationships and has heavily sanctioned Putin's Russia. In all of these contexts, and more, Trump's rhetoric matters even when it does not result in action or policy change. Especially when combined with Trump's indifference to norms, this rhetoric understandably disturbs many people, including many in the institutions under attack. And, of course, it weakens confidence in those institutions.

Taken together, the cluster of Trump's behaviors—the disregard for norms and attacks on institutions, the elevation of the personal over the public, the ceaseless lies, the vilification of and all-out assault on his opposition, and his authoritarian and law-defiant impulses and rhetoric—constitute classic *demagogic* behavior. Posner has defined a "demagogue" as "a charismatic, amoral person who obtains the support of the people through dishonesty, emotional manipulation, and the exploitation of social divisions; who targets the political elites, blaming them for everything that has gone wrong; and who tries to destroy institutions—legal, political, religious, social—and other sources of power that stand in their way."[4] This fits Trump to a T.

Against this background, the case for reform of the presidency is straightforward. Trump has shown that the current array of laws and norms governing the presidency is inadequate to protect institutions vital to the American constitutional democracy and to ensure that the president is, and appears to be, constrained by law. Not every reform proposed in this book is a response to Trump's demagogic political and governing style. Some of Trump's excesses, and some flaws in presidential regulation, had been emerging in prior presidencies. But Trump's particular brand of executive action has added significantly to past problems in ways that now demand comprehensive treatment.

It is possible that the threats posed by Trump to the presidency and other American institutions will end when he leaves the scene, and that the next president will attend more closely to the norms, institutional practices, and rhetorical constraints of Trump's predecessors. On this view, the problems presented by Trump are personal to him and are not structural or pervasive ones that demand reform.

We do not share this view, for four reasons.

First, the experience with Trump has made clear that many of the laws and norms governing the presidency are defective. Some norms—such as the ones concerning release of public information about taxes, wealth, and business operations—proved ineffective and should not be left to the happenstance of who is president or a presidential candidate. As we explain in Chapters Two and Four, these norms should be embodied in binding statutes rather than in norms that the president and candidates can ignore should they wish to incur the political costs (or should they decide that trashing the norms is politically advantageous). Other norms

should be fortified for any future presidency. As we explain in Chapter Eight, Robert Mueller's investigation was the nation's first significant experience with the 1999 special counsel regulations, and many problems emerged from their use. For constitutional and practical reasons, Congress cannot comprehensively legislate on this topic, which must remain subject to a large degree to norms and executive branch regulation, albeit more powerful ones.

Second, while this book is limited to reforms of the presidency, it is not limited to reforms of only the president and the White House. The experience with Trump has revealed that other elements of the executive branch suffer from inadequate guidance and accountability, and sometimes excessive zeal or poor judgment, in important contexts. Consider three controversies over the past several years about FBI investigations of the president or presidential campaigns: the Hillary Clinton email investigation, the Trump campaign investigation, and the counterintelligence and obstruction of justice investigations of President Trump that began in 2017. One of the reasons that these investigations were so controversial is that the law and other guidance on how to handle such investigations were underdeveloped or unclear. Another reason is that officials conducting these investigations sometimes did not adhere to relevant norms. These types of investigations will always be politically controversial, but better, clearer, and firmer rules can help a lot going forward.

Third, even before Trump became president, our deeply polarized politics were leading presidents and their congressional allies to sweep past or give less weight to institutional practices that stood in the way of achieving short-term political aims. The bitter battles over nominations to the judiciary are one example. But they reflect a wider collapse of comity within Congress concerning the basic ground rules for partisan contestation that has undermined its capacity to enact major legislation or even to reach timely agreements on funding government operations. On the issues that most divide the parties, the norms that have guided and checked their interactions have been under pressure for a while and have become characterized by a downward spiraling tit-for-tat of norm-busting actions. Trump's norm-busting is a part of this pattern, and indeed, many people think that Trump is as much an effect of these larger pressures as a cause. But whatever the cause and effect may be (an issue to which we return later in this chapter), norms

regulating government institutions are under threat everywhere and must be attended to.

Fourth, and relatedly, while presidents after Trump might be more respectful of norms, the American people also may continue to elect presidents who distrust elites or profess to do so, who reject expertise and create "alternative facts," who attack and circumvent formal governing institutions, and who disrespect traditional principles of governance. The presidential selection process is now thoroughly democratized and lacks its traditional "vetting" function that, to some extent, the parties once performed. The two political parties, and the polity, are deeply polarized. And the perceived failures of elite institutions along a number of dimensions may continue to fuel populist sentiment on both the right and the left, especially in presidential elections. These presidencies may not be predictably Trumpist in their policies. A populist demagogue in the Oval Office purporting to embody the true will of the people against the elites can be a Democrat or a Republican, on the left or well to the right. And that future president might have a better command of the governance tools of the presidency than Trump, and be defter in circumventing legal and norms-based limits. In many ways, Trump, despite his destructiveness, has often been incompetent at operating the levers of the presidency to achieve his ends; a future president might not be so incompetent.

OBJECTIONS AND CONCERNS

We anticipate a cluster of related objections to, or concerns about, our arguments that the presidency demands reform.

Rhetoric and "Manners"

One objection is that Trump's harsh rhetoric and bad manners don't matter. On this view, he is a democratically elected president who ran and won on a platform that claimed that establishment institutions were corrupt, and he pledged to change those institutions dramatically. His defiance of norms in order to weaken the press and governmental institutions, and his other behaviors described earlier, amount to nothing more in substance than executing the wishes of the electorate. This

view accepts that Trump is rude, brash, shameless, and ill-mannered in executing this mandate. And it maintains that the institutions Trump was elected to change—especially the press and the executive branch bureaucracy—have made clear in their reactions to Trump that they hold precisely the biased establishment views that Trump was elected to redress. According to this view, the reforms we suggest to buck up the norms and institutions governing presidential behavior are undemocratic.

We take this concern seriously, as far as it goes. In particular, we accept that the American people have the prerogative to elect a rude, norm-breaking president who is contemptuous of institutions. Indeed, the possibility is one premise for our analysis of the need for reform.

We nonetheless conclude that reforms in the areas covered by this book are warranted. The principles defended in this book are that the presidency is a public trust, that presidents should not be permitted to abuse the powers of the office to advance their private interests or to politicize law enforcement but should instead be accountable to Congress and the people through rigorous transparency and other mechanisms. These general principles, which we derive from the arc of constitutional history and practice, are rarely contested and should not be up for grabs. Moreover, for the reasons laid out in detail throughout this book, we reject the notion that Trump's authoritarian and institution-attacking rhetoric, and his brash behavior, are irrelevant to the proper functioning of the presidency.

Wrong Institution

A related objection is that we are focusing on the wrong institution. As noted earlier, Trump is not the only agent of norm-breaking behavior, and he and his presidency may be more of an effect of a larger breakdown in governing norms than a cause. Other institutions—including Congress, political parties, the electoral system, and the press—are dysfunctional in ways that have contributed to the nation's difficulties, and to problems in the presidency.

We accept these points. Throughout this book, we explain how pathologies in the presidency are exacerbated by pathologies in other institutions, and we are often quite critical of those institutions. We might have written a book on how to reform these other institutions.

But we have not written that book. Our expertise concerns executive power, and we believe that reform of the presidency is more likely, and more likely to have immediate efficacy, than reform of the other institutions. For purposes of our analysis, therefore, we will largely accept the other institutions as we find them and offer proposals to reform the presidency in that light.

For similar reasons, we do not propose a novel role for courts in policing the presidency. Courts have always played an important but limited role in checking presidential excesses. They are important because they occasionally resolve separation of powers disputes that lay down principles that govern presidential action. It is possible that a more robust judicial role would address some of the problems in the presidency that we identify. But a more robust role for courts is hard to manufacture and direct. And in any event, courts often face many hurdles to adjudicating the legality of presidential action, including standing, the political question doctrine, the absence of a cause of action, the secrecy of presidential action, and the like, especially in the context of foreign relations. This is why governing precedents in this area are few and far between and often not directly on point for contemporary problems. For purposes of the reforms proposed in this book, we assume and accept Supreme Court jurisprudence as we find it.

Is Reform Feasible?

A different concern about our project is whether reform of the presidency is feasible. We have acknowledged that the nation's political system has been moving in a norm-breaking direction for a while, and that the American people may continue to elect norm-breaking presidents in the future. One might think that reform cannot get off the ground, much less succeed, if its aims are persistently opposed by the American people in their choice of presidents and representatives. Moreover, the broader problem of political dysfunction that we have acknowledged makes it hard now to imagine a Congress that is motivated to engage with the robust reforms proposed here, let alone disciplined enough to do so.

Yet presidential reforms of the 1970s show that major scandals arising out of extreme presidential dysfunction and congressional acquiescence can quickly and unexpectedly be followed by landslide elections that

produce large majorities in Congress determined and able to engage in meaningful reform. Something similar could happen as early as 2021, or it might not happen for a while. This book is a road map for when the eventuality occurs.

It is also a road map for when we have a president who is interested in reforming the presidency. Again, although we have acknowledged that future presidents might be less interested in legal and normative self-restraint than past ones, that assumption might be wrong. Many presidents after Richard Nixon, starting with his successor, Gerald Ford, imposed and recognized self-restraints that over the decades developed into important and efficacious norms. Ford's successor, Jimmy Carter, articulated a broad agenda for reform and signed into law key reform initiatives, such as new requirements for legislative and executive branch financial disclosures. We do not know who the next Ford or Carter might be in this respect, or when he or she might appear on the scene. Ultimately, the proper operation of the presidency depends on the character of the president who, at a deep level, values American institutions, including institutions with competing interests that are so vital to the proper functioning of our government.

This means that, when all is said and done, reform depends on the American people. They are not dysfunctional in the ways that Congress is, but they are deeply distrustful of federal governmental institutions and are splintered and distrustful of fellow citizens in some pretty dramatic ways. This is a problem far beyond our jurisdiction, but it affects our task. "Laws are always unstable unless they are founded upon the customs of a nation," Alexis de Tocqueville once said.[5] The laws and norms that govern the presidency work only if a wide swath of the population believes in them, and their legitimacy, and wants them to work. The right kinds of laws and norms can guide action in a proper direction and check many abuses. But ultimately, the efficacy of checks on the presidency depends on the identity of the man or woman whom the American people choose to elect, and the types of pressure that the American people place on members of Congress and other government actors to resist executive branch abuse.

We are mindful of the uncertain prospects for reform. But it is our view that the need for reform is urgent, and the debate over the content of those reforms, to which we hope this book contributes, should not be

delayed until the ripening of conditions for their successful enactment. When the moment comes, it will be important to make the most of it, and fast.

Ignorance About the Future

Jim Baker was a seasoned government attorney who served as FBI general counsel during the many difficult episodes that the bureau faced from 2016 to 2018. When asked about the need for and efficacy of reform within the FBI with respect to investigations of presidential campaigns or candidates, he stated:

> The problem is that the next thing that is big and controversial will not fall into that category, which is why it will be big and controversial and hard to figure out. That was the hard part here. We went to the books that we had available to us, and there's some guidance that's available, and we applied the law. . . . But with respect to a lot of these questions, and how you handle them and how you approach it, it's just very difficult. Hindsight is 20–20. You are always trying to solve the last problem. . . . The future is always going to throw things at us that we haven't thought of before.[6]

This is all true. No reform of the presidency is ever perfect. There is always a danger of under-regulation and over-regulation. There is also an ever-present danger of focusing too much on the last problem and of not adequately anticipating future problems.

Relatedly, every reform effort has unintended consequences. This problem has haunted reform programs in the past and is a challenge to current reform initiatives. Legislators make laws but not usually as they please, and a legislative compromise might be worse than no legislation at all. A reform may be misdirected or off-target because the problem it is meant to address was analyzed inadequately: The data was misread or flawed. What follows from the reform may be markedly different from what its drafters intended. It is also possible for a reform to be cast too broadly, failing to be sufficiently focused or tightly structured, with

the result that it does as much harm as good, or that the damage done exceeds the benefits realized. Or, relatedly, reform might create perverse incentives that produce self-defeating results.

The examples are legion. Following Watergate, the provision for the appointment of independent counsels to address allegations of senior executive branch wrongdoing was meant to ensure investigations free from political manipulation or taint. It was also expected to restore public confidence in the apolitical administration of justice. Instead, it became the focus of bitter partisan disputes in which the impartiality of independent counsels themselves was called into question. The law thrust the courts into a supervisory role, on the assumption that they would insulate the process from the reality or suspicion of political intervention; and yet even the judiciary did not escape unscathed from the politics of scandal. Moreover, the statute appeared in operation to supply incentives for long-running and expensive investigations, sometimes over complex or obscure issues of purported official misconduct. The effect was to thicken the clouds of scandal over Washington and reduce public confidence further.

We are sensitive to these challenges throughout this book, and especially to how reform initiatives can be "weaponized" by political opponents and exacerbate the original problem. One tool in this effort is to pay heed to the lessons of history, which we discuss later in this chapter.

FOUR PRINCIPLES TO GUIDE REFORM

A Strong Presidency

In proposing numerous reforms to the presidency, we begin from the assumption that a powerful, vigorous presidency is vital to the proper functioning of American democracy. Our aim is not to chop down legitimate presidential powers. It is rather, like Arthur Schlesinger Jr.'s in *The Imperial Presidency*, to devise "a strong presidency within an equally strong system of accountability."[7]

Article II of the Constitution vests the president with the "executive Power" and adds a handful of enumerated powers. The Constitution also checks these powers. It requires interbranch collaboration in the exercise of certain traditionally executive functions (such as appointing

executive branch officers and making treaties). And it gives Congress some of the executive powers exercised by the English king (such as the power to declare war) as well as numerous powers to check the presidency, including the control over the purse, a veto-override authority, and impeachment.

Despite the paucity of enumerated powers and the many checks, the presidency has been the central engine of the federal government from the outset, and has grown massively in size and influence over the centuries. Congress over time proved unable to legislate with the efficiency and precision needed to manage society in the face of growing technological and social complexity. In the twentieth century, it delegated massive legislative authority on practically every important policy topic to the more nimble, discriminating, and forceful executive branch, often with minimal guidance. The Supreme Court's constitutional invalidation of the legislative veto in *INS v. Chadha* in 1983 eliminated Congress's major tool for controlling the presidential exercise of delegated power.[8]

Presidential control over foreign and military affairs followed a similar path. As the United States rose to a global superpower, and as the world grew more dangerous, the commander in chief assumed more and more responsibility for national security. And Congress, in turn, gave the president a massive intelligence and military bureaucracy, a fearsome arsenal of weapons, and few hard constraints. The federal courts have, for the most part, gone along with the program in both domestic and foreign affairs.

The central quality that makes the executive branch the appropriate locus for these tasks is its energy, which Hamilton in *Federalist* No. 70 described as "a leading character in the definition of good government."[9] Energy in the executive is a counterpoint to the separation of powers, which by design "has an inherent tendency toward stalemate and inertia," as Schlesinger has explained. "One of the three branches of government must take the initiative if the system is to move," Schlesinger notes. "The executive branch alone is structurally capable of taking that initiative."[10] This is why most of the federal government's greatest achievements over the centuries—from Washington's masterful stewardship at the birth of the nation, to union victory in the Civil War, to Franklin D. Roosevelt's management of the Great Depression and World War II, to many of the most important victories of racial justice (with help from the Supreme

Court, to be sure), to almost all major legislative initiatives (conservative and liberal), to the successful confrontation with the Soviet Union—came through energetic presidential leadership.

The importance of a powerful presidency became apparent with Trump's weak response to the coronavirus pandemic. The problem was not just Trump's failure to grasp the scale of the problem or to plan for it properly, his early efforts to minimize the danger, the steady diet of inaccurate or contradictory information he fed the nation, his open (and unsubtle) efforts to use the crisis to advance his political fortune rather than seek to achieve national unity, or his general miscarriages of leadership. The problem was also that Trump failed to use the legal tools of the presidency to meet the crisis. Unlike most situations in recent decades where presidents have invoked emergency powers, the coronavirus presented a genuine emergency that would have justified Trump's taking more forceful action than he did to meet the threat—for example, by invoking the Defense Production Act much earlier and more aggressively than he did in order to ensure that the nation had adequate and proper medical supplies. But Trump dawdled and acted tentatively when he did finally, if not consistently or decisively, take some action. And the nation suffered as a result.

The need for a powerful presidency is one of the reasons why we do not argue for major constitutional surgery on the presidency—for example, by making the attorney general more independent of the president, or by trying to slice off the president's power to interpret law for the executive branch (which is currently delegated presumptively to the attorney general and the Office of Legal Counsel) and place that authority in an independent body.

We do not endorse such changes to the nature of the presidency, for several reasons.

First, we are fully aware of the pathologies and dangers of executive branch auto-interpretation of the law by the Office of Legal Counsel and other executive branch personnel, but we doubt such changes can be implemented without a constitutional amendment that, in the present and foreseeable political environment, seems impossible. Even absent such an amendment, Congress can affect the president's control over law enforcement by outsourcing it a bit to actors within and outside the executive branch. In the chapters that follow, we propose ways to

strengthen these mechanisms. But the Supreme Court has acknowledged that "there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role"—a description that surely applies to the attorney general and the Office of Legal Counsel.[11]

Second, although politicized law enforcement is an evil to be avoided, and one for which we propose reforms, executive branch interpretation and enforcement of the law are not, and should not be, devoid of political direction. Presidents are elected to devise and manage a governing program, and their success in this endeavor requires them to marshal all the authorities and resources available for this purpose. Every administration is necessarily "political" in this sense. As we explain in Chapter Seven, this nonobvious but important point is one reason why Congress rejected radical restructuring of the president's relationship to the Justice Department, even after Watergate.

Third, and relatedly, in a time of anxiety about the presidency, there is a tendency to try to take political considerations out of executive branch action by placing executive responsibility in nonaccountable actions or institutions. The basic problem with this strategy—and, we argue, a problem to be avoided—is that it places responsibility for politically divisive actions in an actor who is not politically accountable if the decisions he or she makes are wrong or controversial. Weakening the control of accountable actors over core executive decision-making was the strategy of the 1978 independent counsel statute. And in some sense it was FBI Director James Comey's strategy in taking the unusual step of announcing his conclusion that Hillary Clinton should not be indicted, rather than following the Department of Justice chain of command, which gave the attorney general authority and responsibility to make the call. One theme in our proposals is the importance of political accountability to the proper functioning of the executive branch. Another important and, to us, inextricable idea is the need for transparency of executive branch action so that executive branch actors can be held accountable for their actions—by the press; by judges; through congressional oversight, including impeachment; and ultimately in elections.

One should not mistake our inclination against constitutional surgery for the executive branch as an inclination against bold reforms. Some of our proposals are modest, but many are not modest, and

some—for example, our proposal to winnow down the Office of White House Counsel and place many of its legal responsibilities in a Justice Department component—are ambitious to the point of radical. In short, we accept the basic constitutional contours of the presidency that currently prevail and offer reforms of various levels of ambition within those contours.

Law v. Norms

As we have already alluded to, law and norms are different things. Constitutional law is the supreme law of the land that presidents under Article II of the Constitution must faithfully enforce, including against themselves. Constitutional law legally empowers and constrains presidents in ways that cannot be changed absent a constitutional amendment. Statutes are laws enacted by Congress. They must conform to the Constitution (for example, the Constitution prohibits *ex post facto* laws), and they too bind presidents legally until the statutes are changed by Congress itself. And there are other laws that bind executive branch officials in various ways—regulations, executive orders, and the like.

Norms are different. They are *nonlegal* principles of appropriate or expected behavior that presidents and other officials tacitly accept and that typically structure their actions. Examples of presidential norms include holding regular press conferences, taking daily intelligence briefings, maintaining a distance from and certainly not directing the attorney general's prosecutorial decisions, disclosing income tax returns during a presidential campaign, and getting an annual medical checkup and announcing the results to the public. Norms are rarely noticed until they are violated, as the nation has experienced on a weekly and often daily basis during the Trump presidency.

Sometimes it is appropriate to change norms into laws. When FDR sought a third term in office, he violated the norm of a two-term presidency that traced back to George Washington. He did not act illegally in doing so, and the American people ratified his decision when they reelected him in 1940. But the American people had second thoughts after Roosevelt died. They converted the norm into constitutional law, the Twenty-Second Amendment, so that no president could again run for a third term.

One might wonder why so much regulation of the presidency takes place through norms rather than law. There are at least two reasons. First, the Constitution does not permit Congress to regulate some elements of presidential behavior. The president's power to communicate in good faith with the attorney general about a pending case is probably one example. This power is tied so closely to the president's Article II control over the prosecutorial power, and is so central to executive power, that Congress probably cannot regulate it in most instances. And yet there is a powerful norm that has developed inside the executive branch, in the shadow of congressional concern, that imposes a pretty rigid separation between the White House and the Justice Department on prosecution issues. As we explain in Chapter Seven, this norm worked pretty well, but not always, for forty years after Watergate and needs reinforcement after Trump's presidency.

The second reason to prefer norms over laws is flexibility. When norms work well, they have real bite. As a general matter, however, they are more flexible than laws in the sense that a deviation from norms in the exceptional case results only in political sanctions. Presidents have a constitutional obligation under Article II to comply with laws even in unusual or unforeseeable cases where many reasonable people might think an exception is appropriate. But presidents have no constitutional or even legal obligation to comply with norms, and so norms are easier to disregard in exceptional cases. Norms are much less effective in a case like Trump's, since a shameless president or one indifferent to political sanctions can simply disregard them. But the virtue of norms over laws is that sometimes a justifiable case for disregarding norms arises. And relatedly, norms are easier to change or update when they grow stale, since the executive branch can adopt and implement these types of reforms unilaterally without recourse to Congress or the amendment process.

In the pages that follow, we sometimes argue for changing norms to laws, and other times we argue for maintaining norms but changing their content. These choices are contextual. As we explain in the body of our analysis, the issues raised by Trump's finances and conflicts of interest resulted from the mistaken belief that norms rather than law would suffice to induce proper behavior. We argue for statutory reform in these and other cases. Some of the controversies posed by the institutions responding to Trump—for example, the special counsel mechanism, and

the FBI's investigation of the Trump campaign and presidency—arose from what now seem like imprecisely crafted regulations (the special counsel) or the absence of regulatory guidance (the FBI's investigation). In these cases, we argue for strengthened norms and processes to be achieved by reforms internal to the executive branch.

But laws without the support of associated norms can fail to do all the work required for sound choices: Compliance with legal obligations is, of course, always necessary, but it may not be sufficient in novel circumstances or where there is good-faith disagreement about the law. Systematic processes that allow for legal and normative issues to be raised and considered is also essential. Indeed, as we explain later, process is a leading indicator of whether the legal and normative issues are being taken seriously. And, as we also explain, well-targeted transparency measures can hold the key actors accountable. Among other functions, transparency can help induce adherence to process.

The Golden Rule

In recent memory, critics of one party have tended to construe exercises of power by honorable presidents of another party in extreme, uncharitable terms. Such criticism of the presidency tends to be opportunistic and hypocritical.

Democrats tended to like a strong presidency when Barack Obama was in office pursuing progressive ends, and many tended not to imagine or acknowledge how their support for Obama squared with their criticisms of George W. Bush, especially in foreign and national security affairs, or how they might view Obama's exercises of power if a conservative president were using the same tools to pursue conservative ends. Republicans tended to do exactly the same thing in reverse: They were harshly critical of Obama's exercises of power even though they supported analogous exercises of power for quite different ends by Bush and Trump. Similarly, critics and defenders of the presidency tend to like or dislike the actions of the accountability institutions for the presidency—congressional oversight, the special counsel, and the like—depending on whose ox is being gored. We expect that Trump's supporters will find the proposals in this book more congenial once he has left the scene—especially if he is replaced by a Democrat as president.

This is not a new phenomenon. From the beginning of the nation, Schlesinger notes, "views of the proper distribution of power between the Congress and the President depended a good deal less on considerations of high principle than on preferences about the uses to which power was put."[12] The politicization of constitutional argument around the presidency might be inevitable, but it is a hurdle to intelligent reform and should be resisted. We will try to resist it by applying a variation of the golden rule in our analysis: Always imagine whether a constraint on the presidency would be legitimate if your preferred president were in office or, reciprocally, whether a conferral of presidential discretion would be legitimate if exercised by a president of another party. This thought experiment does not answer every question posed about presidential power. But it should help to screen somewhat for the confirmation biases and political NIMBY-ism that seem to have intensified in contemporary, polarized American politics.

The Lessons of History

The presidency is a 230-year old institution. The final principle that guides us is the need for sensitivity to the lessons that history has taught about how the presidency, and reforms of the presidency, operate. No period is richer in relative historical lessons than the 1970s, following Nixon's presidency.

Trump and Nixon differ in many ways, but they also share important traits: an indifference to law, a host of visible psychological difficulties, pathological anti-elitism, and a related hatred of vital government institutions and the press. These traits led both men to act in some extreme ways that exposed fundamental flaws in the presidency. After Nixon resigned, Congress and the executive branch engaged in a series of fundamental reforms—on war powers, ethics, financial disclosures, special prosecutors, campaign finance, presidential records, and much more—that guided the presidency for almost half a century. While those reforms were in some respects very successful, a number fell short of expectation, and Trump's presidency has made clear that in many ways they were not adequate to the task.

We have a lot to say in the chapters that follow about the so-called Watergate-era reforms, which present the essential backdrop

to understanding the problems that bedevil the presidency today. But at the outset, we sound a cautionary note about oversimplifying the "Watergate analogy." The so-called Watergate reforms were based on multiple rationales and sprang from multiple sources and perspectives that were significant as much for their differences as for their similarities.

One aspect of the reform program was anchored in a long-standing Progressive reform tradition dating back to the turn of the twentieth century. This tradition was concerned with promoting "good government" through the promotion of expert, merit-based policymaking; transparency; and checks on undue political and interest group influence made possible by uncontrolled campaign spending and political patronage. An example is the enactment of the major 1974 amendments to the Federal Election Campaign Act, strengthening and establishing a range of controls and transparency requirements for money raised and spent to influence federal elections.

A second strand of reform was prompted by the perceived skew in the balance of constitutional power between the legislative and executive branches, especially but not only in the field of war powers and national security. For example, the War Powers Resolution was a Watergate-era reform but not a response to the scandal itself, just as the Foreign Intelligence Surveillance Act (FISA) of 1978 built on legislative and judicial reforms stretching back to the 1960s to establish a supervisory role for the courts in reviewing and approving executive branch applications for electronic surveillance of foreign agents on U.S. soil.

A third and distinctive reform program was concerned directly with the systematic presidential abuses of power revealed by the Watergate investigations. In the grip of deep resentments and distrust, Nixon disregarded the legal and normative limits on the misuse of executive branch departments and agencies to investigate and harass his political opponents. Among the reforms enacted in direct response to this episode, the Ethics in Government Act provided for a judicially appointed and supervised "independent counsel."

These three very different sources of reform make it misleading to speak of them collectively as a "response" to Watergate. The reforms were also varied in their staying power and effectiveness. The independent counsel statute was controversial in application, susceptible to partisan manipulation, and debilitating to a functioning presidency. The law died

in 1999 with the blessing of both major parties and was replaced with the Justice Department regulations that governed Robert Mueller's investigation of the 2016 election but that have problems of their own. Over these same decades, the campaign finance laws crumbled as political actors excelled at evasive strategies and the Supreme Court greatly restricted Congress's authority to regulate in this area. As Trump's presidency showed, the era's personal financial disclosure requirements have failed to adequately check self-interested government service. And in the field of national security, the War Powers Resolution did not rebalance constitutional war powers, and the FISA process, which seemed to work for a while, is now widely seen as error filled and dysfunctional in practice.

There is one other aspect to the Watergate experience that is not captured fully by an exclusive focus on legal reforms and developments. This was the recognition and honoring of norms of executive branch conduct that were influenced in part by law, in part by executive order, and in part by example in the post-Nixon years. Prominent among these norms was the expectation of professional, independent law enforcement made possible by government lawyers who serve the public and not the president's personal and political interests. This expectation set a standard that both parties affirmed and that presidents publicly embraced in the years following a scandal in which the president appeared as an unindicted co-conspirator in a criminal case brought against, among others, his attorney general and White House counsel. Another norm born of Watergate was presidents' voluntary release of their tax returns. A beleaguered Nixon conceded that "[t]he confidentiality of my private finances is far less important to me than the confidence of the American people in the integrity of the President."[13]

By the time of Donald Trump's presidency, however, these and other norms were under assault, for reasons we have already explained. The proposals in the chapters that follow are informed by the Watergate experience and seek to define with precision the nature of the problems that have emerged and to target reform measures accordingly.

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